

vouchsafing of that prayer. There is moreover no evidence of a vow, made in advance, to become binding conditionally upon the granting of any such prayer. There appear to be no more than the legal fiction of a *nasr* intended to ensure a devout Mohamedan from possibly infringing the restriction placed by the Islamic law upon disposition of *wasihat*.

The *nasr*, moreover appears to call for performance of the gift immediately, irrevocably and *inter vivos*. Testatrix therefore is made to confess herself as barred by the fictitious *nasr*. But the further fiction by which she purports to make the gift binding *inter vivos* and irrevocable is worthy of the fabric of legal fiction of our own judge-made system of 150 years ago. The gift is to be deemed to be of effect three days before her death if natural one day before, if sudden.

It is very clear to me that in neither case could the gift actually take effect at all except after and by reason of the donor's death. As for irrevocability that is an incident of *nasr* no doubt, but how far can it be relied upon as an argument in the case of a fictional *nasr* like ours.

Again, the gift is of immovables in Singapore and our own system of law is *prima facie* applicable.

Again we have never allowed our Wills Ordinance to be subordinated to Islamic law and never recognised any limitation upon the testamentary power completely to dispose. For example we do not recognise, as Islamic law does, an oral Will. And we have applied our own section 13 and held that the Will of a Mohamedan testator is revoked by his subsequent marriage.

How then, can it possibly be argued, whether as a matter of construction or not, that a vow to the Almighty (even if in our case, any such vow was ever made) is good and binding consideration for a promise otherwise voluntary.

For these reasons and upon the facts as I see them I hold that Testatrix really intended by this instrument to make a testamentary disposition, that her gift was revocable and that it is expressed and was intended only to take effect conditionally upon and by reason of and subsequent to her own death. I add that even in form it appears sufficiently to conform to our Wills Ordinance.

For these reasons I decide this issue in favour of Syed Sallim, and hold that here was a good Codicil and a good testamentary disposition. I give costs to both parties out of the general residue, to be taxed as between Solicitor and Client, I add that the fear of Testatrix's amateur legal advisers appears to be groundless and that her Will and Codicil together do not after all appear in fact or quantum to transgress the prohibition of Mohamedan Law against disposal by Will of more than one third of a Testator's Estate, although as I have stated the transgression in a case like ours of such a prohibition would not invalidate the Will.

I send the Petition back to the Registrar for formal proof of execution of the Codicil and a grant of Probate accordingly.

Judgment accordingly.

Solicitor for the Plaintiff—C. H. da Silva.

Solicitors for the Defendant—Braddell Bros.

[APPELLATE CRIMINAL JURISDICTION]

COBBETT, J.

May 22, 1933.

REX v. LIM KENG CHUAN.

[PENANG MAGISTRATE'S APPEAL No. 7 of 1933]

Ordinance No. 133 (Betting) S. 3 (c)—Common Betting House—Game of Skill.

Held, that if a place is used for wagering it may be a "common betting house" even though the wagering is upon the result of a game of skill.

APPEAL from conviction recorded by the District Court at Penang to the Supreme Court, heard before Cobbett, J. The Appellant was convicted on a charge of having used the "New Bazaar," Penang Road, Penang, as a common betting house.

C. D. D. Hogan for Appellant.

Taylor, D.P.P. for Respondent.

The facts and arguments sufficiently appear from the Judgment.

COBBETT, J.—The Accused was charged with the management of a place used as a common betting house under Ordinance 133 (Betting) section 3 (c) and with the management of a place used as a common gaming house under Ordinance 45 (Common Gaming Houses) section 4 (c). He was convicted on the first charge and acquitted on the second.

The facts are not in dispute.

The Accused is the manager of an enclosure in Penang Road which is known as the New Bazaar. There are a number of stalls in the enclosure having boards whereon the game, which gave rise to this prosecution, is played. The enclosure is open to the public, and no entrance fee is charged to go in. The board on which the game is played has a number of holes each of which is numbered. The player purchases a ball or to put it another way he pays an entrance fee as consideration of which he received a ball and writes a number upon a slate. He then rolls the ball, and if the ball falls into a hole having a number which corresponds to the number written on the slate, the player gets a prize in the form of a tin of cigarettes.

It seems that the minimum entrance fee or price of a ball is five cents, but the player can, if he wishes, pay any entrance fee or price for a ball and, if the ball comes to rest in the hole bearing the number nominated, the player receives a tin of cigarettes for each five cents he paid.

Or, he can nominate different number for each five cents paid, in which case he receives a prize of one tin if the ball enters any of the holes nominated.

It is admitted that the game is one of pure skill, but it is argued for prosecution that this is not material and it was contended that the definition of Common Betting House in Ordinance 133 is taken almost word for word from the Betting Act 1853. Learned Magistrate agreed with this contention and held that cases here are bound by decisions under that Act and taking *Peers v. Caldwell*, (1916) 1 K.B. 331 as an authority, he decided that the offence charged had been committed. It seems, however, that in order to justify his decision, he had to invoke the provisions of section 3 (d) of Ordinance 133 under which section the Accused was not charged, and this was pressed as a ground for the appeal.

With due respect to the learned Magistrate I think he was wrong in holding that cases here are bound by decisions under the Betting Act 1853. In this case there was no evidence that the Accused received any money or that any money was received on his behalf, and therefore the Betting Act section does not apply, neither does section 3 (d) of Ordinance 133.

A comparison of these two sections will at once shew the difference between them.

Section 2 of the Betting Ordinance defines a Common Betting House as any place kept or used for betting or wagering on any event or contingency of or relating to any horse race or other race fight game or sport or exercise to which the public or any class of the public has or may have access and any place kept or used for habitual betting or wagering on any such event or contingency as aforesaid whether the public has or may have access thereto or not.

Section 3 (c) under which the Accused was convicted, is as follows:—

Any person who (c) has the care or management of or in any manner assists in the management of a place kept or used as a common betting house shall be liable, etc.....

There is no doubt that the "place" comes within the definition of a "place" in the Ordinance, and that it is "used" within the meaning of the Ordinance and that the Accused himself admitted that he was the manager and the public had access.

The relevant parts of section 1 of the Betting Act of 1853 are as follows:—

No....place shall be opened kept or used for the purpose of....any person having the care or management of or in any way conducting the business there of betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such person as aforesaid as or for the consideration for any assurance undertaking promise or agreement express or implied to pay or give thereafter any money or valuable thing or any event or contingency of or relating to any.... game or sport or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid.....

The question to be decided is, was this place used for betting or wagering on any event or contingency of or relating to any game or sport, and therefore a Common Betting House.

Section 1 of the Betting Act is divided into two parts:—

- i. the business of betting, and
- ii. the purpose of receiving money or valuable thing as consideration for an undertaking to pay on a contingency.

Section 2 of the Betting Ordinance may also be said to be divided into two parts:—

- i. Using a place for betting, and
- ii. Using a place for wagering.

In the foregoing I find I am supported by the judgment of Ridley, J., in *Peers v. Caldwell*. After assuming the game to be one of skill he goes on to say:—

"Now I think we must not be misled by consideration of the strict meaning of the word 'Betting' for that word, although used in the first part of the section, is not used at all in the second part under which these proceedings are taken. As was pointed out by Lord Coleridge in *Bond v. Plumb* the section deals with two separate and distinct offences; the first part of the section deals with betting *eo nomine* the keeping of houses for the purpose of betting with persons resorting thereto, while the second deals with the keeping of houses for the purpose of receiving money in advance not necessarily in connection with betting in the ordinary sense of that term, but as and for the consideration of an undertaking to pay thereafter money or money's worth on a contingency of the kind therein specified."

Ridley, J., in the same case, goes on to say:—

"In the case *Fielding v. Turner* where the question whether the use of a very similar automatic machine was an offence under the Gaming Act, Lord Alverstone, C.J., said 'The keeper or owner of such a machine backs his chance against the person who uses it.' That, I think, is the proper way of regarding the transaction which took place here. The Appellants backed their chance that the boys would not catch the ball in the cap. It was in the nature of a wager. The fact of there being a possibility of exhibiting some degree of skill in playing with this machine does not, in my opinion, affect the question of the liability of the appellants. To my mind the boys were not exercising skill. They were thinking only of the sweets."

Avory, J., in his judgment, said:—

"I agree with Mr. Gordon Hewart that the test is what was the consideration for the half-penny. If it was clear the boys paid their half-pennies as entrance

fees for the purpose of entitling them to participate in a game of skill the transaction would not constitute an offence under the second part of the section. On the other hand, if the consideration was solely the promise of the appellants to give the player two pennyworth of sweets if the ball fell into the clown's cap it is equally clear that the transaction did constitute an offence."

The case of *Peers v. Caldwell* is not, in my opinion, an authority for deciding this case unless the word 'wagering' can be said to mean the same thing as the second part of the section of the Betting Act; and I think that instead of attempting to reconcile the latter parts of the two sections it is better to consider what 'wagering' means, and for this purpose the judgment of Hawkins, J., in *Carhill v. Carbolic Smoke Ball Company*, (1892) 2 Q.B.D., at page 490, is of the greatest value. He said:—

"It is not easy to define with precision what amounts to a wagering contract, nor the narrow line of demarcation which separates a wagering from an ordinary contract; but, according to my view, a wagering contract is one by which two persons professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract."

That definition is quoted with approval by Lord Hanworth, M.R., in *Earl of Ellesmere v. Wallace*, (1929) 2 Ch. at page 24. He says:—

"There is no doubt the terms of this definition were carefully chosen. The latter part of it as to neither of the parties having any other interest in the contract than the stake is of great importance. It is a qualification that accords with the words used by Grose, J., in *Good v. Elliot* where he speaks of wagers as illegal under the statutes then in force 'where the party has no other interest in the subject matter of them than that which he chooses to create by his bet.'"

He then refers to *Brogden v. Marriot* and continues:—

"It is clear from other like cases that the substance of the matter is to be regarded."

In my view the transaction exactly comes within the definition of Hawkins, J., above quoted.

The appellant and the player held opposite views as to whether the ball would roll into the numbered hole and they mutually agreed that dependent upon the determination of that event one should win from the other the stake, i.e., the five cents, and the other should hand over a tin of cigarettes. I cannot find that either party had any real interest in that contract other than the stake or cigarettes he would win or lose; there being no other real consideration.

I, therefore, find that the parties were in fact wagering; that the place was used for wagering and became a Common Betting House; and that the Accused was properly convicted under section 3 (c).

The appeal will, therefore, be dismissed.

Conviction affirmed.

Solicitors for the Appellant—Messrs. Hogan and Ivens.

[ORIGINAL CIVIL JURISDICTION]

HUGGARD, C.J.

June 9, 1933.

In the Matter of the Will dated the 4th day of November, 1927, and the Codicil dated the 27th day of July, 1929, of Leow Chia Heng deceased.

LIM SOO SIAM

vs.

LEOW YONG MOEY & ORS.

[SINGAPORE ORIGINATING SUMMONS

No. 216 of 1932]

Will—construction—Ademption of legacy.

The Testator by his Will directed that his executors and trustees should within 6 months of the impending marriage of his daughter Leow Moey Hong pay to her guardians \$10,000 for her marriage expenses and if only part of such \$10,000 should be so expended the balance was to be paid to the said Leow Moey Hong on her wedding day for her sole use. Leow Moey Hong was in fact married during the lifetime of the Testator and he paid all her marriage expenses which amounted to \$9,445.53. A question arose (*inter alia*) whether the legacy of \$10,000 was adeemed either in whole or in part by Leow Moey Hong's marriage during the Testator's lifetime.

Held, that the legacy of \$10,000 to Leow Mui Hong for marriage expenses was partially adeemed by Leow Mui Hong's marriage during the Testator's lifetime and by the payment by the Testator himself of her marriage expenses to the extent to which the Testator paid such marriage expenses and that the balance should be paid to her for her sole use. *Pym v. Lockyer* followed.

ADJOURNED ORIGINATING SUMMONS.

By this Originating Summons a number of questions were raised for decision by the Court most of which have no general application. The facts and arguments sufficiently appear from the Judgment which is reported in full.